SURFACE RIGHTS BOARD

ANNUAL REPORT

April 1, 2012 to March 31, 2013

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Board Profile and Mandate

The Surface Rights Board (SRB or the Board) is a quasi-judicial administrative tribunal established under the *Petroleum and Natural Gas Act* (*PNGA*). The Board has jurisdiction to resolve disputes under the *PNGA*, *Mining Right of Way Act*, *Mineral Tenure Act*, *Geothermal Resources Act*, and *Coal Act*.

In British Columbia, most landowners do not own subsurface rights to petroleum, natural gas, or minerals. The majority of subsurface rights are owned by the Crown. The government can issue rights to resource companies and free miners for the exploration and development of subsurface resources on private property. The resource company or free miner must compensate landowners for loss or damage caused by entering and using their land to access subsurface resources. The Board's role is to assist in resolving disputes when the parties cannot agree on compensation or other terms of entry to land.

When a landowner and a resource company or free miner are unable to reach an agreement on right of entry to the land and the compensation that should be paid to the landowner for that right of entry, either party may apply to the Board for mediation and arbitration of the dispute. The Board may make an order allowing a person or company to enter private land if the Board is satisfied they need the land to explore for, develop, or produce a sub-surface resource. The Board does not have jurisdiction to determine whether a proposed subsurface installation is appropriate or complies with the legislation and regulations.

If damage to land is caused by an entry for the purpose of exploring for, developing or producing a subsurface resource, the landowner may apply to the Board for mediation and arbitration of damages payable by the subsurface holder.

If the parties to a surface lease cannot agree to terms for rent renegotiation after a certain period of time, either party may apply to the Board for mediation and arbitration of their dispute.

The Board also has jurisdiction to resolve disputes about whether the terms of a surface lease have been complied with.

An overview of the Board's processes may be found in Appendix 1.

The Board is accountable to the Minister of Energy, Mines and Natural Gas but is independent of the Minister and Ministry in its decision making capacity and in the management of applications before it.

The Board has a part-time chair, and may have up to eight additional part-time members.

The following Board members served during fiscal year 2012/13:

Name	Position	Start date	Expiry
Cheryl Vickers	Chair	July 22, 2007	Dec. 31, 2013
Simmi Sandhu	Vice Chair as of Jul 22/12	July 22, 2007	July 31, 2014
Robert Fraser	Member	July 22, 2007	July 31, 2013
William Oppen	Member	Dec. 8, 2008	Dec. 31, 2013
Viggo Pedersen	Member	March 5, 2009	July 31, 2013
Valli Chettiar	Member	June 22, 2012	July 31, 2014
Brian Sharp	Member	November 23, 2012	December 31, 2015

Biographical information on the Board Members is at Appendix 2.

Dispute Resolution Activities

The Board received 69 applications from April 1, 2012 to March 31, 2013, under the *PNGA*. The Board received two applications under the *Mineral Tenure Act* (*MTA*). The Board did not receive any new applications under the *Mining Right of Way Act, Coal Act* or *Geothermal Resources Act*. The following chart shows the number of applications by type received from April 1, 2012 to March 31, 2013 compared to the previous year.

Nature of Application	**# received in period**	**2011/12**
PNGA (right of entry/compensation for wellsite)	4	2
PNGA (right of entry/compensation for flowline)	14	8
PNGA (right of entry/compliance/related activity	0	2
PNGA (damages)	4	4
PNGA (rent review)	40	18
PNGA (compliance)	4	2
PNGA (termination of surface lease)	0	3
PNGA (other)	3	7
MTA	2	1
Total new applications	**71**	47
Cases outstanding from previous year	66	56
Total caseload in period	**137**	**103**

As can be seen from the chart above, the Board's case load was considerably higher in the past year than in the year before, principally due to a significant increase in the number of rent review applications.

When the Board receives an application for right of entry for an oil and gas activity, a mediator will determine whether access to land is required for the requested activity, and if so, work with the parties to try and resolve compensation. The Board does not have jurisdiction to determine if a requested activity meets regulatory requirements or to deal with landowner's concerns respecting placement of an installation, environmental impact, or safety – these are matters within the jurisdiction of the Oil and Gas Commission (OGC). The Board will generally require parties to resolve issues within the jurisdiction of the OGC prior to issuing an entry order. The mediator will continue to work with the parties in an effort at resolving compensation issues even after an entry order has been made until the mediator determines a resolution is unlikely. Once the mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication. An application may require several mediations before it is either resolved or referred to arbitration.

The Board similarly mediates applications for damages and rent review in an effort at having the parties resolve the dispute. Once a mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication.

The parties may also negotiate issues without the assistance of a Board mediator in at effort at resolution.

The Table below shows the number of applications completed during the reporting period and open at the end of the period.

Case completions	# before the Board	Completed in period	Open at March 31, 2013
Applications received in 2012/13	71	15	56
Active applications from previous years at April 1, 2012	66	40	26
Total	**137**	**55**	**82**

Of the applications open at March 31, 2013, 34 were at the mediation stage of the process and 18 at the arbitration stage pending an arbitration hearing. Two applications were stayed pending resolution of issues within the jurisdiction of the Oil and Gas Commission.

Outstanding cases at year-end	Deficient	Stayed Pending OGC Process	Mediation stage	Arbitration stage	Post Arbitration
PNGA	7	2	55	18	1
MTA	0	n/a	1	0	0

The following Table shows the level of dispute resolution activity in the reporting period compared to the previous five years.

	2012/13	2011/12	2010/11	2009/10	2008/09	2007/08
Mediations	55	58	20	8	9	8
Arbitrations	7	0	4	0	3	1

The following Table shows the resolution method.

	2012/13	2011/12	2010/11	2009/10	2008/09	2007/08
Applications settled	48	23	41	7	14	8
Applications dismissed for lack of jurisdiction	1	1	0	1	1	2
Applications determined by Arbitration	6	6	4	1	2	1
Applications determined by summary written process (Change Orders)		7				

The following Table shows the type and number of formal orders and decisions issued by the Board in the reporting period.

Type of Order	Number
Right of Entry Orders	6
Termination of Right of Entry Orders	1
Compensation decisions	2
Damages decisions	0
Rent Review decisions	5
Jurisdiction decisions	1
Costs decisions	3
Procedural decisions	2
Reconsideration decisions	2
Amend or Change Orders	2

Two of the right of entry orders were to allow entry to land to construct and operate natural gas wells, and four of these orders were for right of entry to construct and operate flowlines. Of the compensation decisions, one was an arbitrated decision relating to the compensation payable for entry and use of land to construct and operate flowlines, and one related to compensation for entry and use of land for a proposed wellsite.

The Board's decisions may be judicially reviewed under the *Judicial Review Procedure Act* within the time established by the *Administrative Tribunals Act*. No new judicial review applications were filed from Board decisions in the past year. As of March 31, 2013, one judicial review application was outstanding from a compensation decision rendered in 2010.

Decisions of Note

What follows is a brief synopsis of some of the Board's decisions of note in the reporting period.

Board's jurisdiction – The landowners disputed that the Board had jurisdiction to grant a right of entry to a company to build and operate a pipeline permitted by the Oil and Gas Commission on the grounds that the permitted project was not a "flowline" within the meaning of the *Petroleum and Natural Gas Act* and *Oil and Gas Activities Act*. This was the Board's first consideration of the term "flowline" since the legislation was amended effective early October 2010. The permitted pipeline contained three segments. Segments 001 and 002 carried natural gas and fluids, respectively, from at a well site to the north of the Lands in issue to a tie in point at another well site just south of the Lands. Segment 003 was a fuel line for the operation of onsite equipment at the well site to the north. The Board determined that the three segments collectively were a "flowline" within the meaning of the legislation and that the Board had jurisdiction to grant the right of entry to the Lands. (*Murphy Oil Company Limited v. Shore*, Order 1745-1, September 13, 2012).

Compensation – Upon the termination of an entry order by consent, the Board determined the compensation payable for entry to and use of Lands in advance of the entry order having been made for the purpose of surveying and other preparatory work prior to an application to the Oil and Gas Commission for a well permit. (*Canadian Natural Resources Limited v. Kerr*, Order 1715-5, December 20, 2012).

Procedural – The landowners entered a right of way agreement with Encana Corporation that was subsequently conveyed to Spectra Energy Transmission. The Oil and Gas Commission granted Spectra a pipeline permit. Spectra entered the Lands subject to the right of way agreement originally entered with Encana to construct the permitted pipeline. The landowners alleged that the pipeline permitted by the OGC and constructed on the Lands was substantially different from that proposed by Encana and contemplated by the right of way agreement. They brought an application against Encana under section 164 of the *Petroleum and Natural Gas* act asking the Board to amend the right of way agreement to make it clear that construction of the permitted pipeline was not authorized under it. The Board found that Encana was not the appropriate party to the section 164 application because it was no longer a party to the right of way agreement. The Board found that Encana's rights and obligations under the right of way agreement had been assigned to Spectra, and that any application under section 164 of the *Act* should be brought against Spectra. (*London v. Encana Corporation*, Order 1791-1, January 8, 2013).

Termination of Right of Entry – In the context of a reconsideration application to determine whether compensation was payable following the termination of a right of entry order, the Board found that the provisions in section 167(1) of the *Petroleum and Natural Gas Act* for the expiry of time and notice to the landowner

prior to terminating a right of entry order, are not mandatory if the landowner consents to termination of the right of entry. (*Canadian Natural Resources Limited v. Kerr*, Order 1715-5, December 20, 2012.)

Rent Review – The Board declined to increase rent where the landowners did not provide evidence that their actual loss arising from the right of entry was equal to or exceeded the rent being paid. (*Velander v. Imperial Oil Resources Limited*, Order 1726-2, December 11, 2012).

The Board increased annual rent in several cases following a consideration of the evidence to support probable loss going forward. (*McDonald v. Penn West Petroleum Limited*, Order 1742-1, November 21, 2012; *Merrick v. Encana Corporation*, Order 1697-5, November 28, 2012).

Although the landowner did not send a Notice to Negotiate as prescribed in the Board's Rules, the Board found on the basis of the communications between the parties and their actions on those communications, that notice to negotiate as required by section 165 of the *Petroleum and Natural Gas Act* had been effectively given for the purpose of determining the effective date of any revised rent. (*Wilderness Ranch Ltd. v. Progress Energy Canada Ltd.*, Order 1786-90-1, February 37, 2013).

Other Board Activities

Administration:

The Chair of the SRB, Cheryl Vickers, is also the Chair of the Property Assessment Appeal Board (PAAB). The Ministry of Energy, Mines and Natural Gas, the Ministry of Community, Sport and Cultural Development (responsible for PAAB), and PAAB have entered into a Memorandum of Understanding appointing PAAB with the responsibility to oversee the operations and provide day to day administrative services for the SRB. The Board has a Service Agreement with Service BC in Fort St. John and Dawson Creek to provide the public with a local contact point and personal assistance in reviewing applications. The volume of inquiries through Service BC is very low. Most clients communicate directly with the Board through its office in Richmond via email or toll free phone or fax.

Security Deposits:

The Board collected $22,500 in security deposits in the reporting period.

The Ministry of Finance is holding $314,550 in security deposits (some dating back to 1976) that the Board ordered paid prior to entering land. In the reporting period, the Board processed 13 applications for the return of security deposits and ordered refunds totaling $122,500.

Filing of Surface Leases:

Section 178 of the *PNGA* requires the holders of surface rights to provide the Board with copies of surface leases and right of way agreements. Compliance with this provision was initially slow, but the Board now frequently receives copies of surface leases and amendment agreements as required. The Board does not know whether all surface leases and amendment agreements are being filed.

The Board is required to make copies of surface leases and right of way agreements available for public inspection at its office. Occasionally, members of the public have attended at the Board's office to view leases. Additionally, the Board has provided electronic access to electronic copies of leases for inspection.

The Board continues to work with the Ministry with respect to the enactment of Regulation that will allow publication of surface lease information and the creation of a searchable data base to assist parties before the Board with research on lease payments.

Finances

The Board's budget for 2012/13 was $108,000. As detailed in the table below, the Board was under budget by $4,674.

Expenditure Type	Budget	Actuals	Variance[1]	Notes
Salaries[2]	49,000	38,906	10,094	More work performed under Board member fees
Benefits	12,000	8,948	3,052	
Board Member fees and expenses	23,000	37,273	(14,273)	
Travel	23,000	8,809	14,191	Most travel under Board member expenses
Information systems		1,050	(1,050)	
Office and business[3]	1,000	8,340	(7,340)	Overhead charges
Total Expenditures	**108,000**	**103,326**	**4,674**	

Notes:

1. In the variance column (brackets) denote that actual expenditures were over budget.

2. The majority of salaries and benefits were for the Chair, Vice Chair and a member who is cross-appointed to the Property Assessment Appeal Board.

3. Overhead charges were billed at 15% of salary and benefits costs as per an MOU between the Property Assessment Appeal Board and the Ministry of Energy, Mines and Natural Gas.

Challenges for 2013/14

The Board's case load significantly increased last year and there is no reason to expect it will not continue at a similar level or possibly increase further.

The Board would like to enhance its website to provide information to assist parties with self-evaluation of applications and to provide more information about Board processes and substantive issues. The Chair will pursue opportunities that may arise from the tribunal transformation project, initiated by the Ministry of Justice, to develop on line "self-help" tools.

The Board could also benefit from a case management system, and the chair is optimistic that initiatives toward tribunal clustering and sharing of technology may create opportunities for the Board to benefit from case management technology.

The Board will continue to work with the Ministry in the development of regulations under the *PNGA*. In particular, the Board would like to see the development of a regulation to prescribe the information from surface leases that the Board may publish pursuant to section 178(4) of the *PNGA*. In the meantime, the Board is maintaining electronic copies of surface leases and amendment agreements and making them available for public inspection in accordance with section 178(3) of the *PNGA*.

The Board will also work with the Ministry in the development of an administrative penalty regulation enabling the Board to impose administrative penalties under section 179 of the *PNGA* for failure to provide the Board with copies of surface leases under section 178 of the *PNGA*. In the meantime, the Board will work with industry and other stakeholders to encourage compliance with section 178 of the *PNGA*.

The Chair will meet with the Commissioner of the OGC to ensure the Memorandum of Understanding on coordinated dispute resolution is working effectively and consider whether changes are required.

The Chair will continue to consult with stakeholders, evaluate the effectiveness of the Board's Rules and practices and consider whether changes are necessary.

Appendix 1

Overview of the Board's Process

Application

An application must be made on the form prescribed by the Board in its Rules. The Board reviews applications to ensure that they are within its jurisdiction and that they are complete and comply with the Board's Rules and relevant legislation. If an application is deficient, the Board will write to the applicant to provide an opportunity to correct any deficiencies. The Board may dismiss the application if the deficiencies are not corrected, or if an application is not within the Board's jurisdiction.

Mediation

A mediation is a dispute resolution process that attempts to facilitate resolution of the issues by agreement. A mediations may be conducted in-person or by telephone conference. A mediation is confidential and without prejudice to the positions the parties may take later in any arbitration proceedings.

If the parties have not resolved the issues at the end of the mediation session, the Board Member may schedule another mediation or refuse further mediation. If the mediator determines that access to private land is needed to explore for, develop or produce a subsurface resource, the mediator may issue a right of entry order and order the payment of a security deposit and partial payment for compensation. If the mediator makes an order refusing further mediation, the Board must arbitrate the dispute.

Arbitrations

The Board must arbitrate when the parties cannot reach an agreement. An arbitration is a dispute resolution process where each party presents evidence and arguments and the Board makes a decision based on those submissions.

Before an arbitration hearing, the Board will require the parties to attend a pre-hearing conference, usually conducted by telephone. The Board member will, in consultation with the parties, determine how the application will proceed including determining the issues to be decided, and setting dates for hearing and for the pre-production of evidence and witness lists.

The Board may conduct an arbitration hearing by telephone conference, by written submission, or in-person depending on the nature and complexity of the issues.

In-person hearings are open to the public and may be presided over by a panel of one or more members of the Board. Persons giving evidence at a hearing must swear an oath or affirm that their evidence will be the truth. The panel has control over the conduct of the hearing, including how the evidence is presented, what evidence is admitted, and the issuance of summons for witnesses.

Following the conclusion of the arbitration hearing, the panel will issue a written decision with reasons.

Evidence

The Board may accept any evidence that it considers relevant, necessary and appropriate with the exception of evidence that is inadmissible in court because of a privilege under the law of evidence. The Board will normally set timelines in advance of the hearing for the parties to submit documents or expert reports they intend to rely on at an arbitration.

Withdrawals or Consent Orders

A party may withdraw all or part of an application at any time, by completing a Withdrawal Form and delivering it to the Board and the other parties. If the parties settle the application, they must advise the Board and either withdraw the application or request that the Board incorporate the terms of the settlement into a Consent Order.

Costs

The Board may order a party to pay all or part of the costs of another party and, in exceptional circumstances, may order a party to pay the costs of the Board. Ordinarily, unless otherwise ordered by the Board, landowners may expect to recover their costs of the mediation process relating to applications for right of entry and associated compensation. The Board may order costs on its own initiative or on the application of a party.

Appealing the Board's Decision

Decisions of the Board may be judicially reviewed by the Supreme Court of British Columbia.

Appendix 2

Board Members' Biographical Information

Cheryl Vickers, Chair

Cheryl Vickers is a lawyer and formerly practiced in a variety of fields, including administrative law. Cheryl was appointed as Chair of the Mediation and Arbitration Board in July 2007. She also serves as Chair of the Property Assessment Appeal Board, a position to which she was appointed in January 2003, and in March 2013, Cheryl was appointed Acting Chair of the Civil Resolution Tribunal. Cheryl was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and served as a member of that organization's Board of Directors including as Secretary from 1996 to 1998 and as President from 2004 to 2006. Cheryl has assisted in curriculum development for BCCAT courses offering training to appointees of quasi-judicial boards and tribunals. She has delivered these courses and workshops on case management and alternate dispute resolution for tribunals.

Simmi K. Sandhu, Vice Chair

Simmi Sandhu is a lawyer, called to the BC Bar in 1990. Simmi was appointed as a member of the Mediation and Arbitration Board in 2007 and is also a Vice Chair of the Property Assessment Appeal Board, a position she has held since 2001. As a lawyer, Simmi's areas of practice included administrative law, civil litigation, corporate/commercial law and real estate transactions. She has extensive experience in quasi-judicial proceedings, having acted as a Chair of the Board of Referees and has training and experience in conflict resolution and mediation. Simmi is on the Board of Directors of the British Columbia Council of Administrative Tribunals, currently serving as Past President.

Robert Fraser

Active in the real estate industry for many years, Rob Fraser has been a sales person, agent/manager, owner, local board president, provincial association president, and chair of a real estate related insurance company. In addition to his extensive experience and training in real property valuation, Rob also has expertise and training in conflict resolution, mediation, arbitration, and negotiation. He has a BA, an MA and did doctoral studies specializing in micro-demographic models. Rob was appointed as a Vice Chair to the Property Assessment Appeal Board in 1998. He was appointed to the Mediation and Arbitration Board as a member in 2007 and served as Vice Chair from December 2008 until July 2012.

William Oppen

Bill Oppen is retired and lives in Dawson Creek. Prior to his retirement, Mr. Oppen was the Deputy Minister of Renewable Resources for the Yukon government. He also served as Deputy Minister of Economic Development and has held senior positions with the government of Alberta and the Federal government. He has served on numerous committees including one looking at new work heritage sites for Canada. Bill is a published author and currently is a member of the Board of Directors of the Provincial Capital Commission. He was appointed to the Mediation and Arbitration Board in 2008 as a member.

Viggo Pedersen

Viggo Pedersen was a dairy farmer for 30 years, during which time he represented the dairy farmers to the British Columbia Milk Producers Association and served as the Dairy Director of British Columbia Investment Agriculture. Active in the community, Mr. Pedersen has been a member of the Chamber of Commerce, and the Rotary Club. He is also a former member of the Peace River Regional District Board of Variance. Currently, Mr. Pedersen is a Director of the Northern Lights College Foundation. He was appointed to the Mediation and Arbitration Board in 2009 as a member.

Valli Chettiar

Valli Chettiar was appointed to the Surface Rights Board in 2012, and she is also a Vice Chair of the Property Assessment Appeal Board. Valli received her law degree from UBC, clerked for the Supreme Court of British Columbia, and was admitted to the BC Bar in 1993. Prior to establishing her sole practice in 2007, Valli held senior positions including partner of Borden Ladner Gervais LLP and General Counsel to Phillips, Hager & North Investment Management Ltd. Her practice areas included corporate, commercial, securities, real property, estates and trusts, corporate governance and administrative law. Valli has experience in dispute resolution, and served on the BC Health Professions Review Board from 2008 to 2010. Valli has also served on many professional, business, community and governmental organizations.

Brian Sharp

For 30 years, Brian Sharp owned and managed a real estate brokerage comprised of 180 real estate agents and 20 staff, with offices in Victoria, Westshore, Sidney, and Duncan, BC. During this time, he served on many committees for the Victoria Real Estate Board including mediation and arbitration of real estate disputes. Brian was the first recipient awarded the Victoria Real Estate Board Managing Broker of the Year in recognition of his role in mediating disputes between the real estate industry and the public. Since 2009, Brian has been the Vice Chairperson of the Parks and Recreation Commission for the Municipality of Oak Bay. He was appointed to the Property Assessment Appeal Board and the Surface Rights Board in November 2012.